ICE

Atlanta Calgary Chicago Houston London New York Singapore

September 14, 2009

Mr. David Stawick
Secretary
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

RE: CME Petition to Commingle Customer Funds Used to Margin Credit Default Swaps Cleared by the CME with Other Funds Held in Segregated Accounts (Submission #08-175)

Dear Mr. Stawick:

The IntercontinentalExchange, Inc. ("ICE") respectfully requests a 60-day extension of the comment period with respect to whether the Commodity Futures Trading Commission's ("CFTC" or "Commission") should grant the Chicago Mercantile Exchange's ("CME") petition to commingle customer funds used to margin credit default swaps ("CDS") cleared by the CME with other futures customer's funds held in segregated accounts ("Petition").

As background, ICE operates three regulated futures exchanges: ICE Futures Europe; ICE Futures Canada, and ICE Futures US. ICE also owns and operates five derivatives clearinghouses: ICE Clear US, a Derivatives Clearing Organization under the Commodity Exchange Act, located in New York and serving the markets of ICE Futures US; ICE Clear Europe, a Recognized Clearing House located in London that serves ICE Futures Europe, ICE's OTC energy markets and operates as ICE's European CDS clearinghouse; ICE Clear Canada, a recognized clearing house located in Winnipeg, Manitoba that serves the markets of ICE Futures Canada; and ICE Trust, a U.S.-based CDS clearing house. In March 2009, ICE acquired The Clearing Corporation, established in 1925 as the nation's first independent futures clearing house. It provides the risk management framework, operational processes and clearing infrastructure for ICE Trust. The Clearing Corporation also provides clearing services to the Chicago Climate Futures Exchange.

On August 26, 2009, the Commission posted on its website a request for comment on the CME's Petition.[1] If granted, the Petition would allow the CME to commingle customer margin for credit default swaps with CME's customer funds used to margin futures products. In website release, the Commission has stated that comments are due on September 14, 2009. This deadline gives the public less than twenty days to comment.

[1] http://www.cftc.gov/newsroom/4drequestforcomment.html. The website notice was amended on August 26 to request comments on the petition.

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The CME's Petition raises novel issues that could have systemic implications with respect to CME's clearinghouse and to the financial industry as a whole. In the past, the Commission has been sensitive to these issues and granted extensions of time to fully vet important issues.[2] Moreover, allowing the CME to commingle customer margin for credit default swaps with customer funds used to margin futures products requires careful customer protection-related policy consideration, given the risk profile of credit default swaps.

As an operator of clearinghouses, ICE supports the Commission's efforts to protect customer funds. Proper segregation of customer assets is an important safeguard in preventing sudden illiquidity in times of financial distress.

While the Commission's efforts are important, there are many issues that need discussion before the Commission grants the CME's petition. Important issues that need to be addressed include:

- Whether as a matter of public policy, the CME should be permitted to commingle customer margin for credit default swaps with customer funds used to margin futures contracts, given the inherently riskier nature of credit defaults swap contacts.
- The necessary requirements with respect to the liquidity of the underlying markets or how the risk of a potential default with respect to cleared credit default swaps should be mitigated;
- Whether a cleared credit default swap should be converted into a future in order to be commingled with other customer funds;
- Whether the Commission will grant relief solely to CME or whether it should issue a blanket policy on cleared only credit default swaps;
- Whether a cleared only credit default swap contract can be considered a "commodity contract" pursuant to Subchapter IV of Chapter 7 of the U.S. Bankruptcy Code, and thus be subject to the bankruptcy protections in Part 190 of the Commission's regulations[3]; and
- Whether the CME Petition should be granted in light of the Commission's concurrent rulemaking to expand Part 190 to include an account class for cleared OTC swaps.

Further, Chairman Gensler recently requested that Congress pass legislation that would make it certain that cleared only swaps can be treated as a "commodity contract"

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[2] *See, e.g.*, CME request for extension of comment period (December 26, 2007); 73 Fed. Reg. 1205 (January 7, 2008) (extending the comment period in response to the CME's request).
[3] The CFTC previously raised this issue in an interpretive letter with no opportunity for public comment. 73 Fed. Reg. 57235 (October 2, 2008).

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pursuant to the Bankruptcy Code.[4] In light of this request, the Commission should consider whether legal uncertainty exists with respect to whether a bankruptcy court would afford "commodity contract" treatment to a credit default swap that has been commingled with other funds that clearly meet the definition of a "commodity contract". The Commission should consider whether granting the CME's Petition to commingle customer funds is premature until this issue is resolved.

In order to properly consider these issues, additional time for industry comment is needed. Therefore, ICE requests that the Commission extend the comment period for the CME's Petition for 60 days.

If you have any questions, please feel free to contact Trabue Bland, Assistant General Counsel, at 770-916-7832, or me at 770-738-2120.

Sincerely,

Johnathan H. Short
Senior Vice President &
General Counsel

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[4] August 17, 2009 letter from Gary Gensler, Chairman, Commodity Futures Trading Commission to Senator Harkin and Senator Chambliss.